SUPREME COURT, U.S.
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No. 93-433

In The

Supreme Court of the United States

October Term, 1993

ESTATE OF JANICE D. PITRE,

Petitioner,

v.

WESTERN ELECTRIC COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF

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ARGUMENT

The arguments made by the respondent demonstrate that, unless this Court grants review of the petition for writ of certiorari and reverses the judgment of the court of appeals, victims of gender discrimination in the United States Court of Appeals for the Tenth Circuit and in any other circuit that chooses to follow the novel approach taken below will never receive damages commensurate with the injury they have suffered.

The fundamental flaw in the reasoning of the court of appeals is repeated in the Brief in Opposition at 7. Respondent argues that "the very cases petitioner cites recognize that district courts 'must be granted wide discretion in resolving ambiguities.' *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976) (citing *Pettway*, 494 F.2d at 260-61), *cert. denied*, 433 U.S. 919 (1977); *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1273 (8th Cir. 1977) (same)." But, until the decision below, no circuit had held that in resolving ambiguities, the district court *has discretion to resolve them in favor of the employer*. That is precisely what the district court did in the instant case, as demonstrated in the petition for certiorari and explained briefly below. Petitioner agrees that a district court has wide discretion in choosing how to resolve ambiguities in a Title VII case, *provided, however, that they are resolved in favor of injured victims*. For the first time in Title VII litigation, the lower courts resolved ambiguities in favor of an employer who had deliberately discriminated against women both before and after Title VII made such discrimination illegal.

Respondent cannot and does not challenge the finding of the district court, affirmed by the court of appeals, that it engaged in pervasive intentional discrimination from 1965 until 1981, and that it was therefore liable for back pay for the class period, which ran from June 1973 to January 1981, and for front pay thereafter. Nor can respondent dispute the record evidence that respondent's work force was approximately evenly divided between men and women at all relevant times in this case. Thus, absent discrimination, there is no reason to believe that the promotions that took place would not have been evenly divided between men and women and that demotions and layoffs would not have been approximately equal between the sexes.

It is, of course, impossible for any court to know whether, absent discrimination, there would have been no statistical difference between the success rate of men and women in the work place. Precisely because it is impossible to know exactly what the statistics would have been had there been no pervasive and intentional discrimination over three different decades, it was essential under Title VII that the district court recognize that, in light of the impossibility of knowing the success rates with any certainty, the plaintiff class was entitled to the benefit of the doubt. That is why the plaintiffs suggested to the district court that it should assume that, absent discrimination, half of the promotions from 1965 to 1981 would have gone to women.[1] Based on that assumption,

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[1] Had it done so, at least half of all section chief positions and Service Center salaried jobs would have been filled by women.

half the salaries at each salary-graded level and at section chief would have been paid to women.[2]

In the first appeal, the Tenth Circuit reversed and remanded the matter to the district court because the court "ignored the effect of past discrimination on the current position of women in the company." Pet.App. 41a. On remand, the district court explicitly recognized that it was impossible to know exactly what percentage of women would have been at any promotional level from 1974 through 1980, and the district court therefore decided to create an "entirely hypothetical" work force. Pet.App. 41a. Thus, instead of resolving the ambiguity of the exact percentage of women who would have been employed in each category in favor of the victims injured by respondent's discrimination, the district court created *sua sponte* an imaginary construct to determine the employment ratio of men to women had there been no discrimination from July 1965 to December 1974. Beginning with a totally hypothetical construct unsupported by facts, the district court proceeded to determine the actual number of promotions and downgrades that could be

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[2] Respondent's argument that seniority was a valid factor accounting for the male/female earnings gap is but an echo of earlier attempts to justify discrimination on the basis of a seniority system not found to be *bona fide*. The district court found that seniority ("time-in-grade") was a mere pretext for invidious discrimination in demotions and promotions during the 1970's (Pet.App. 132a-135a). The Tenth Circuit agreed in *Pitre I* (Pet.App. 81a-85a). The earnings gap during the 1970's was in part the product of its persistent, illegal promotion practices after July 2, 1965, which allowed males to accumulate greater time-in-grade at the upper M-levels and at section chief – positions involving higher salary ranges.

allocated to men and women under the imaginary and hypothetical numbers with which the district court began. Pet.App. 41a. The court abused its discretion in choosing this approach and departed from the requirements set forth in the opinions of this Court and every other circuit.

The district court's approach resolved ambiguities in favor of the discriminating employer and was therefore completely inconsistent with every other circuit that has addressed the issue. Contrary to the suggestion in the respondent's Brief in Opposition at 4, the class members do not challenge factual findings by the district court. They challenge *only* the district court's decision to deal with the impossibility of reconstructing respondent's work force for the period 1965-1974 by resolving ambiguities in respondent's favor rather than in favor of the victims of respondent's persistent and continual discrimination.

By ignoring the only reasonable approach to resolving the ambiguity in calculating promotions – the assumption of parity between the sexes in promotions – the district court necessarily adopted a hypothetical promotion scheme that mirrored the discriminatory practices that gave rise to this suit. The district court's approach is without factual support. The court admittedly engaged in no fact-finding, since there were no facts to find. And the district court rejected the assumption of parity, even though it was clearly available as a reasonable option and

resolved ambiguities in favor of the victims of discrimination as required by law.[3] In rejecting parity, the district court gave no reasons.

Petitioners suggest that, absent a factual basis for choosing another assumption, if the doctrine that ambiguities must be resolved in favor of victims is to have any meaning at all the assumption of parity is required in a work place in which women and men have a history of virtually equal representation. In the instant case, the lower courts reject the assumption of parity without justifying the rejection and instead adopt a fictional promotional scheme that mirrors the respondent's history of discrimination and denies petitioners a reasonable and equitable remedy.

The courts' approach undermines the "make whole" purpose of Title VII recognized in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). A court that resolves ambiguities in favor of the discriminating employer cannot award "the most complete relief possible." *Id.* at 421. This is so because this approach undervalues the effects of past discrimination.

The District of Columbia Circuit recognized in *Thompson v. Sawyer*, 678 F.2d 257, 290 (D.C.Cir. 1982), that

> [w]hen discrimination continues over time . . . the harms it causes are compounded. An employee denied a raise in one year will fall further behind in subsequent years if raises in

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[3] Parity as the guiding principle in a "rightful place" remedy was also fully supported by the evidence at trial that the skills necessary for satisfactory performance at most jobs could be and indeed were learned through on-the-job training.

> subsequent years are a function of prior salaries. Likewise, an employee denied a promotion in a given year may be frozen out of additional promotional opportunities, unless the missed rung on the promotion ladder is somehow replaced. When the effects of illegal discrimination are compounded, basing the plaintiffs' compensation only on events within the two-year accrual period seriously shortchanges their recovery for the harm actually suffered during the accrual period itself.

The approach adopted by the district court here is the exact opposite of that used by two other circuits. In both *Thompson v. Sawyer*, *supra*, and *Hameed v. Intern. Ass'n of Bridge, Etc.*, 637 F.2d 506, 520-21 (8th Cir. 1980), the courts of appeals adopted a rule of parity (or proportional representation) in determining, *for remedial purposes*, how many class members would have been promoted absent discrimination during the relevant period. The circuit courts assumed that, under a nondiscriminatory selection process, class members would have been promoted in the same proportion as others. Inexplicably, the district court ignored this reasonable approach.

The district court's approach here, approved by the Tenth Circuit, signals a dangerous course for Title VII. If this decision is permitted to stand, district courts would have wide discretion to create imaginary reconstructions of past events that favor employers who have been guilty of the worst forms of discrimination and deny victims of discrimination a reasonable remedy. Petitioners respectfully suggest that this case is of enormous importance, and that the Court should grant review to announce that a district court has wide discretion in choosing how to

resolve ambiguities in a Title VII case, *provided, however, that they are resolved in favor of injured victims*. Until this case, that has been the law throughout the United States. It must remain the law if Title VII is to provide the remedy which Congress intended for victims of discrimination.

CONCLUSION

The interpretation of the lower courts' remedy approach advanced by the respondent underscores the prudence of granting the Petition for Writ of Certiorari so that the congressional purposes underlying Title VII and the make-whole principle of *Albemarle* may be reaffirmed and Title VII may continue to be an effective remedy against proven discrimination and a deterrent against future illegality.

Respectfully submitted,

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